This "security" to the defendant need only consist of some form of assurance to the court that the plaintiff will perform his obligation. In *Zelleken* v. *Lynch*,[14] the court found that the plaintiff's expenditure of a considerable sum in developing the leases in question was satisfactory proof of his intention to perform. Sometimes the fact that the plaintiff has elected to bring suit is considered sufficient.[15] This consideration is of less magnitude, however, in the principal case, as the contemplated performance is concurrent. In this situation a conditional decree affords adequate protection to the defendant.[16] Under such a decree, the plaintiff's right is made contingent upon his continued performance, and the defendant is fully protected. J. R. E.

EVIDENCE

Evidence — Husband and Wife — General Incompetency to Testify against Each Other in Criminal Proceedings

Defendant was indicted and found guilty of cutting with intent to wound one Delia Wright. The trial court, over defendant's objection, permitted his wife to testify against him as a witness for the state. From the action of the trial court overruling a motion for a new trial, defendant prosecuted appeal. In reversing the conviction and remanding the cause, the Court of Appeals for Hamilton County, applying the pertinent statute,[1] found the language to "exclude the possibility of construing it as implying an intention to clothe the wife with a general competency as a witness against her husband."[2]

The Ohio statute provides in part: "No person shall be disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction of crime. Husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for personal injury of either by the other . . . "[3] It is well settled that the removal

[14] *Supra*, note 13.

[15] *Philadelphia Ball Club* v. *Lajoie*, *supra*, note 13.

[16] *Gt. Lakes & St. Louis Transportation Co.* v. *Scranton Coal Co.*, 152 C.C.A. 437, 239 Fed. 603 (1917); *Elk Refining Co.* v. *Falling Rock Cannel Coal Co.*, 92 W. Va. 479, 115 S.E. 431 (1922); *Fuchs* v. *Motor Stage Inc.*, 62 Ohio App. 20 (1939); 2 A.L.I. Restatement of Contracts, § 372, comment.

[1] Ohio G.C. sec. 13444-2.

[2] *State* v. *Goodin*, 60 Ohio App. 362, 14 Ohio Op. 244, 28 Ohio L. Abs. 421 (1939).

[3] Ohio G.C., *supra*, note 1.

of the common law disqualification of interest does not render husband and wife competent witnesses for or against each other.[4]

While the statute expressly provides for testimony in behalf of the spouse in a criminal case, it is singularly silent as to the general competency of one spouse to testify against the other. Applying the rule of construction adopted in *State* v. *Orth*,[5] the court in the principal case concluded that the legislature impliedly manifested an intent not to disturb the spouse's general incompetency except as specifically modified by the statute.[6]

It is arguable that this factual situation is covered by the later provision in the statute, which reads: "Husband or wife shall not testify concerning a communication made by one to the other, or *act* (italics added) done by either in the presence of the other during coverture, unless the communication was made or *act* done in the known presence or hearing of a third person competent to be a witness . . . "[7] What authority there is in this state negatives this suggestion,[8] on the basis that this clause was not meant to enlarge the specific exceptions to a spouse's general incompetency in such cases.

Though for the purposes of the principal case it was not necessary to decide, it is not at all clear what position the Ohio courts will take when the issue is confined to a question of whether this "general incompetency" is a rule of privilege or of qualification. For three hundred years it has now been recognized as a fundamental maxim that the public has a right to every man's evidence.[9] This right is subject to two general exceptions—witness disqualification and witness privilege. In the abstract, they are easily distinguishable. A witness who is disqualified is not permitted to testify.[10] A witness who is privileged is not compelled to testify, but may do so if the exemption be waived by the proper party.[11]

With respect to our particular problem, the common law rule has always been stated to be that neither party to a marriage is a competent

[4] *Johnson* v. *U. S.*, 221 Fed. 250, 137 C.C.A. 106 (1915); *Barber* v. *Goddard*, 9 Gray (Mass.) 71 (1857); *Hasbrouch* v. *Vandervoort*, 9 N. Y. 153 (1853); *Ex parte Beville*, 58 Fla. 170, 50 So. 685, 19 Ann. Cas. 48, 27 L.R.A. (N.S.) 273 (1909).

[5] 79 Ohio St. 130, 86 N.E. 476, 22 L.R.A. (N.S.) 240 (1908).

[6] *State* v. *Payton*, 10 Ohio Dec. Rep. 826, 21 Cinc. L. Bull. 337 (1889); *in accord*, *Ulmer* v. *State*, 157 Miss. 807, 128 So. 749 (1930); *State* v. *Herbert*, 92 N. J. Law 341, 105 Atl. 796 (1918).

[7] Ohio G.C., *supra*, note 1.

[8] *Rosser* v. *State*, 10 Ohio L. Abs. 69 (1931).

[9] WIGMORE, TREATISE ON LAW OF EVIDENCE, (2d Ed. 1923) sec. 2192; *Lathrop* v. *Clapp*, 40 N. Y. 328, 100 Am. Dec. 493 (1869); *Ex parte Barnes*, 73 Tex. Crim. 583, 166, S.W. 728, 51 L.R.A. (N.S.) 1155 (1914); *In Re Davies*, 168 N. Y. 89, 6 N.E. 118, 56 L.R.A. 855 (1901).

[10] MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE, (4th Ed. 1932) sec. 245.

[11] *Ibid.*

witness in favor or against the other,[12] save in a few exceptional cases in which their testimony is held admissible on the ground of necessity.[13] As a general principle this sufficed in most instances. There was no occasion for further analysis—to decide whether anti-marital testimony was a disqualifying factor or a matter of privilege.

Clearly, at common law a favorably testifying spouse was disqualified.[14] The exclusion was absolute; the consent of neither spouse could have made the other competent. Coupled as it generally was in statement with this disqualification, it was but natural that many courts considered an adverse testifying spouse to be disqualified.[15] The better reasoned authority, however, supports the privileged character of such testimony.[16] Historically, the latter approach seems to be on firm ground. The privileged nature of this testimony was recognized some time prior in point of time to its association by Lord Coke in 1628 with the disqualification.[17] Logically dissimilar policies underlie the two rules. The rationale for the disqualification is the danger of false testimony; for the privilege, marital dissension and a natural repugnance of compelling a wife or husband to be the means of the other's condemnation.[18]

The Ohio courts previous to the enactment of the first statutory modification followed the general rule as to the spouse's general incompetency.[19] Nor are there any decisions as to the real character of this "incompetency." There is *dictum* in a comparatively recent appellate case,[20] however, that indicates that this common law incompetency could not be waived.

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[12] COKE, COMMENTARY UPON LITTLETON, 6 b. (1628); *Stein* v. *Bowman*, 13 Pet. 209, 10 U. S. (L. Ed.) 129 (1839); *Wilke* v. *People*, 53 N. Y. 525, 1 Cow. Cr. 541 (1873); *Burlen* v. *Shannon*, 14 Gray (Mass.) 433 (1860).

[13] BLACKSTONE, COMMENTARIES, (1765) I, p. 443; *Butler* v. *Phillips*, 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204 (1906); *State* v. *Kodat*, 158 Mo. 125, 59 S.W. 73, 81 Am. St. Rep. 292, 51 L.R.A. 509 (1900); *Whipp* v. *State*, 34 Ohio St. 87, 32 Am. Rep. 359 (1877).

[14] WIGMORE, *supra*, note 9, sec. 604 comments: "There cannot be the slightest doubt upon the principle, but the few rulings are not satisfactory, partly owing to the usual statutory regulation, in the same section of both the disqualification and the privilege, the language of the one being in truth inappropriate for the other." See *Barbat* v. *Allen*, 7 Exch. 609 (1852) (waiver not allowed, because the consent was not given till after the judge's rule of exclusion. *Quaere:* Suppose consent had been given in time.); *Falk* v. *Witham*, 120 Cal. 479, 52 Pac. 707 (1898) (incapacity of the other spouse to consent does not allow an examination).

[15] *Barber* v. *People*, 203 Ill. 543, 68 N.E. 93 (1903); *Brock* v. *State*, 44 Tex. Cr. 335, 71 S.W. 20 (1902); *Davis* v. *State*, 45 Tex. Cr. 292, 77 S.W. 451 (1903).

[16] *Pedley* v. *Wellesley*, 3 C. & P. 558 (1829); *People* v. *Chadwick*, 4 Cal. App. 63, 87 Pac. 384 (1906); *Benson* v. *Morgan*, 50 Mich. 77, 14 N.W. 705 (1883); GREENLEAF, TREATISE ON THE LAW OF EVIDENCE, (16th Ed. 1899) sec. 333e.

[17] Anon., 1 *Brownlow* 47 (1613).

[18] WIGMORE, *supra*, note 9, sec. 2228.

[19] *Steen* v. *State*, 20 Ohio St. 333 (1870); *Schultz* v. *State*, 32 Ohio St. 276 (1877); *Whipp* v. *State*, 34 Ohio St. 87, 32 Am. Rep. 359 (1877); *State* v. *Smith*, 7 Ohio N.P. 72, 9 Ohio Dec. (N.P.) 749 (1898).

[20] *Locke* v. *State*, 33 Ohio App. 445, 169 N.E. 833, 7 Ohio L. Abs. 653 (1929).

Under the present statute[21] and its immediate predecessors, whose provisions for our purposes are the same, the question remains unanswered. It presents a vexatious problem, particularly in view of the absence of Ohio common law authority on the point.

It is certainly arguable that the very absence of statutory reference to anti-marital testimony reflects the intention of the legislature to retain the common law rule.[22] If so, we have reached a stalemate, except for such *dicta* as referred to earlier. That same case[23] continues as to the effect of the statute: "The spouse is no longer absolutely incompetent. Husband or wife may testify for each other, and this partial competency makes it possible for the accused to waive the competency of such witness when called by the state." However irrational this approach may seem, it is fairly apparent that the court is seeking to declare this a privilege.

In *Ruch* v. *State*[24] the question was directly in issue. On a trial for a crime, the wife of accused was called by the state and gave material testimony, and no objection was made and no motion to exclude was made during the trial. The court held this to be a waiver of the statutory provisions and its admission no reversible error. Despite the construction adopted by the court, the case is not too helpful. Though the wife be incompetent, still if no objection is made, there is invited error. The burden is upon defendant to object.

From the standpoint of policy, every consideration supports the theory that this "incompetency to testify against one's spouse" is a matter of privilege.

Should we conclude that, as a matter of fact, the Ohio courts look upon this as a rule of privilege, the one remaining problem is: Whose is the privilege and who may waive it? If we consult the reason most commonly advanced in support of the privilege, namely, the prevention of marital dissension, it would seem to attribute the privilege to the marital party only, and not to the marital witness. But taking the other suggested reason for the privilege, namely, immunity from the repugnant situation of being condemned by one's spouse, the privilege seems to be equally that of party and of witness.[25]

It has been established in some courts that at least the privilege belongs to the party spouse against whom the other is offered as a wit-

[21] Ohio G.C., *supra*, note 1.
[22] *State* v. *Orth*, *supra*, note 5.
[23] *Loche* v. *State*, *supra*, note 20.
[24] 111 Ohio St. 580, 146 N.E. 67 (1924).
[25] WIGMORE, *supra*, note 9, sec. 2241; see 2 L.R.A. (N.S.) 863.

ness.[26] Rarely is the privilege denied to belong to the witness spouse.[27] And rarely also is it denied to belong to the party spouse.[28]

Though to assume from the present state of the cases that the Ohio courts will construe this general incompetency to testify against one's spouse to be a privilege may seem somewhat radical, the definite trend throughout the country is certainly in this direction. In line with this, the most acceptable means of clarifying the irresolution resulting from the clumsily worded statute is by legislative enactment specifically providing that anti-marital testimony is privileged.

R. G. T.

EVIDENCE — RES GESTAE — HEARSAY RULE — SPONTANEOUS EXCLAMATIONS

Res Gestae is the "lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos . . . the conflict and the chaos will not cease until the various conceptions concealed beneath the ample wings of the *res gestae* are released from a coverture as alien to most of them as the nest from which the mis-laid cuckoo first surveys the world."[1] The use of the term *res gestae* and its application to the field of evidence by Lord Ellenborough in 1805 was more or less of an historical accident.[2] It has come down since 1805 through custom or habit and is used as a reason for permitting many varieties of subject matter to be placed in evidence. It is one of the most ubiquitous phrases in the law[3] and is perhaps used most frequently in the law of evidence. This note is limited to an analysis of the use of *res gestae* in that field.

[26] *Ward* v. *Dickson*, 96 Ia. 708, 65 N.W. 997 (1896); *People* v. *Gordon*, 100 Mich. 518, 520, 59 N.W. 322 (1894); *Lihs* v. *Lihs*, 44 Neb. 143, 62 N.W. 457 (1895).

[27] *Turner* v. *State*, 60 Miss. 351 (1882) (assault and battery on the wife, the wife compellable to testify, though unwilling, the husband not having a privilege).

[28] *State* v. *Geer*, 48 Kan. 752, 754, 30 Pac. 236 (1892) (the wife may consent, though not compellable, to testify against husband); *Com.* v. *Baronian*, 235 Mass. 364, 126 N. E. 833 (1920); *Com.* v. *Barker*, 185 Mass. 324, 70 N.E. 203 (1904).

[1] Stone, *Res Gestae Reagitata* (1939) 55 Law Q. Rev. 66.

[2] The first use of the plural term, *res gestae*, by a judge is believed to be in the opinion given by Lord Ellenborough in *Aveson* v. *Kinnaird*, 6 East 188, 193-194 (1805), wherein he referred to *Thompson* v. *Trevanion*, *Skinner* 402 (1694), as holding admissible "as part of the *res gestae*" certain statements made by an injured person immediately after an assault. As a matter of fact, there was no reference made to any such term as *res gestae* in Lord Holt's opinion in *Thompson* v. *Trevanion*. Prior to 1805 the singular form *res gesta* had been used several times in judicial reports. See Thayer, *Bedingfield's Case*, 15 Am. L. Rev. 5, 81, for a history of the terms *res gesta* and *res gestae*.

[3] See 3 WIGMORE, EVIDENCE (2d ed. 1923) secs. 1768-1769. To establish liability for acts of agent: 2 MECHEM on AGENCY, (2d ed. 1914) secs. 1781-1785 and secs. 1793-1799; *Thomas* v. *Hargrave*, Wright's Rep. (Ohio, 1834) 595. To establish liability for acts of co-conspirator: *Clawson* v. *State*, 14 Ohio St. 234 (1863), *Hutchinson* v. *State*, 8 Ohio C.C. (N.S.) 313, 18 Ohio C.D. 595 (1906).